IN THE

# UNITED STATES

# CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE STEAMBOAT EUGENE, GASTON JACOBI and CHARLES RUFF,
*Libellants and Appellees,*

JOEL P. GEER, *Claimant and Appellant,*

WALTER M. CARY, FRED M. LYONS and EDWARD J. KNIGHT,
*Intervenors and Appellees.*

# BRIEF OF APPELLEES ON MOTION TO DISMISS

JOHN C. HOGAN AND
PATTERSON & EASLY,
*Proctors for Appellees.*

SEATTLE, WASHINGTON.

LOWMAN & HANFORD S. & P. CO., SEATTLE

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## MOTION TO DISMISS APPEAL.

Appellees hereby move the court to dismiss the appeal in this cause for the reason that the decree appealed from was not a final judgment, and therefore not one

from which an appeal might be taken according to law.

The decree in this case was an award of damages in favor of each of the libellants and intervenors in a fixed sum to each, with a direction that the vessel libelled be sold and the proceeds be paid into the registry of the court, but by its terms, the decree reserved other material issues in the case for further determination by the court.

(1) After fixing the amount of the appellees' several recoveries the decree provided—

"And it is further ordered that the claim of the intervening libellant, C. Hennigar, be reserved for such judgment or order as the court may deem just upon such further hearing as may be had upon the issues herein." (See Decree, Trans. pp. 405–407, Record p. ——.

C. Hennigar mentioned was a libellant who had lawfully intervened in the cause with leave, by the filing of his libel and stipulation for costs before default entered. (See Trans. pp. 12–13, 14 and 404, and Record p. ——.

The claim of Hennigar was for repairs made subsequent to the original libellant's claims, and he sought priority over them. A stipulation signed by appellant's proctors as well as the proctors for appellees, was entered into in relation to the Hennigar libel as follows:

"It is hereby stipulated that the libel on account of repairs herein originally filed, shall stand herein as undetermined and an existing libel herein, and that the present owners of said claim for repairs shall, if they so desire, amend said libel and substitute for the original libellent, the present owner of said claim for repairs (Dated) November 30, 1897." (See Trans., p. 440, R. p.——

(2) And further, the decree appealed from did not make any distribution of the funds to come into the registry of the court or establish the priorities between the libellants and intervening libellants, but by its terms, the decree expressly reserved the matters of distribution and priority for the further judgment of the court. The decree in that respect provided—

"That the marshall shall pay the proceeds arising from such sale, after deducting the costs and expenses thereof, into the registry of this court, there to await the further order of the court in the premises as to the distribution of the same." (See Trans. p. 405-7.)

It is plain therefore from an inspection of the decree itself that the court below, in entering the judgment appealed from, did not complete its decretal action in the case, but expressly reserved the cause for the decision and determination of further questions between the parties from the decision of which future appeals might lie, namely:—

*First*—The question of the validity and amount of the undetermined libel of Hennigar, and,

*Second*—The question of priority between the different libellants and intervening libellants and the distribution of the funds, as well as the adjusting of costs.

Leaving either of these questions open for future decision, the decree would not be final and therefore not appealable, for there can be but one appeal in a cause.

The test of a final decree is stated by Chief Justice Waite to be as follows:—

"That judgment is final for the purposes of a writ of error to this court, which terminates the litigation be-

tween the parties on the merits of the case, so that, if there should be an affirmance here, the courts below would have nothing to do but to execute the judgment already rendered. If the judgment is not one which disposes of the whole case on the merits, it is not final."

*Bostwick vs. Bunkerhoff, 106 U. S., 3.*

The judgment here appealed from does not answer this definition, for if it should be affirmed, the court below would have still to determine on the other libel pending, on the matters of priority and distribution. From an error of judgment on these questions, a further appeal would lie.

"Where the district court of the United States, sitting in admiralty, decreed that a sum of money was due, but *the amount to be paid was dependent upan other claims that might be established*, this was not such a final decree as would justify an appeal to the supreme court." (Syllabus.)

*Montgomery vs. Anderson, 21 How., 386.*

And in the same case the court in its opinion says:—

"Under the act of Congress, no appeal would lie from the district to the circuit court until there was a final decree upon the whole case, that is, *not until all the claims on the money in the registry had been ascertained and adjusted* and the whole amounts of the proceeds of the sale *distributed* by the decree among the parties which the district court deemed to be entitled, according to their respective *priorities*."

*Montgomery vs. Anderson, supra.*

In the case of *Mordeci vs. Lindsay, 19 How., 199*, where the district court found in favor of libellants, but referred the matter to the clerk of the court "to ascer-

tain the charges to be made against the respective parties to the suit," it was held not to be a final decree.

"A decree setting aside a transfer and ordering a reference to ascertain amounts and priorities of creditor's claims, is not final within the rule."

*Talley vs. Curtain, 7 C. C. A., 1.*

"A decree awarding a certain rate of salvage of the proceeds is not a final decree, but at most only an interlocutory decree in the nature of a final decree," and in the opinion Judge Story said:—"It was interlocutory in its character for many purposes. It directed that *the charges and expenses of keeping and selling the property and the fees and charges of the officers of the court* to be first deducted from the proceeds of the sale. Now the exact amount of these charges and fees were not ascertained and were necessarily open to further inquiry, and might become matters of controversy between the parties in which they might have the right to take the opinion of the court."

*The Steamboat New England, 3 Sumner, 495.*

"In the district court the libel was dismissed and the damages against the captors. There had been a reference to a commissioner to ascertain the amount of the damages and before the report of the commissioner had been acted upon, the appeal was taken," * * * Chief Justice Marshall said: "The court has had the question submitted in this cause under consideration, and is of opinion that the appeal is not well taken. The decree of the district court was not final in the sense of the act of Congress. The damages remain undisposed of, and an appeal may still lie upon that part of the decree awarding damages."

*The Palmyra, 10 Wheat., 502.*

Benedict's Admiralty (2d ed.), page 345, lays down the law in respect to what decrees in admiralty are final so as to be appealable, as follows:

"The final decree is not that which decides upon the substantial merits of the case, but that which completes the decretal action of the court. If, therefore, there remain to be made any order,—for costs,—for confirmation of a report,—for distribution, or other order which is but a consequence of the decree on the merits, the appeal cannot be entered until such order is made; that is the final decree; not till then is it in a state for execution without further action of the court below."

And in Henry's Admiralty Jur. and Pro., p. 391, it is said:

"A decree in favor of libellants for an ascertained amount payable out of a fund arising from the sale of a vessel, but the amount payable in the decree depended upon the ascertainment of other claims upon the same fund and not adjudicated, is not a final decree and no appeal will lie until all the claims on the money in the registry have been adjudicated, and a final decree of distribution has been entered, adjudging the respective priorities and rights of the parties entitled."

Under the authorities we respectfully submit to the consideration of the court that the decree in this case was not a final judgment from which an appeal would lie, and this appeal ought, therefore, to be dismissed.

JOHN C. HOGAN AND
PATTERSON & EASLY,
*Proctors for Appellees.*